STATE OF MICHIGAN

COURT OF APPEALS

KHARON KINCANNON,

Plaintiff-Appellee ,

v

DETROIT PUBLIC SCHOOLS, ALEYAH DAVIS, GODWIN IDUMA, RAMON JONES, KAREN MCEWEN and VELMA SNOW,

Defendants,

and

LORNA MAXIE,

Defendant-Appellant.

UNPUBLISHED
May 13, 2014

No. 313742
Wayne Circuit Court
LC No. 11-008436-CZ

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

In this personal injury suit, defendant Lorna Maxie appeals the trial court's order that denied her motion for summary disposition. For the reasons stated below, we reverse and remand for entry of summary disposition for Lorna Maxie.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of injuries sustained by plaintiff, then a ninth grade student at Henry Ford High School ("HFHS") in Detroit, when he was assaulted by another student, codefendant Davis. Maxie was teaching a summer school English class at HFHS and assigned to the classroom where Davis accosted plaintiff.

On the day of the incident, Davis initiated the altercation by teasing plaintiff for a sustained period of time. As Maxie sat at her desk in the front of the classroom, she noticed the interaction between plaintiff and Davis. Before the assault at issue, plaintiff complained to Maxie, who then admonished Davis, several times, to leave plaintiff alone. Maxie testified that later in the class period, she heard plaintiff loudly shout something to Davis. When Maxie saw Davis move toward plaintiff instead of returning to her seat, Maxie intervened, and escorted Davis back to her seat and tried to calm her down and prevent any physical violence.

Despite Maxie's warnings, Davis continued to tease plaintiff, which prompted him to state that he was going to "get security." As plaintiff exited the classroom, Davis blocked his path, pushed him to the hallway floor, and punched and kicked him. Maxie and the school's principal, who was outside the classroom in the hallway, responded and pulled Davis away from plaintiff.

Plaintiff initiated this suit, and alleged, among other things: (1) gross negligence; and (2) violation of MCL 722.623. Defendant Detroit Public Schools (DPS) stated that it was entitled to summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10), as MCL 691.1407(2) gave it immunity from suit. The trial court granted summary disposition to all defendants except Maxie, who then appealed the decision to our Court.[1] She says correctly that she is also entitled to immunity under MCL 691.1407(2) (and therefore should have been granted summary disposition) because her conduct: (1) did not amount to gross negligence; and (2) was not the proximate cause of plaintiff's injury.

II. ANALYSIS[2]

The Governmental Tort Liability Act, MCL 691.1401, *et seq*, governs the tort liability of governmental agencies and employees. MCL 691.1407(2) provides that:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency *is immune from tort liability* for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

[1] The trial court did not specify under which court rules it granted or denied summary disposition.

[2] "This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). Summary disposition is appropriate where the plaintiff's claim is barred under immunity granted by law. MCR 2.116(C)(7). To determine whether a plaintiff's claim is barred because of immunity granted by law, the reviewing court accepts the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). The reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party has immunity. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996).

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to *gross negligence that is the proximate cause of the injury or damage.* [Emphases added.]

Under Michigan law, a governmental employee acting within the scope of her employment is only liable in tort if: (1) she is grossly negligent; and (2) her conduct is the proximate cause of the injury or damage complained of.[3] "Gross negligence" is defined as conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a); see also *Odom v Wayne Co*, 482 Mich 459, 469–470; 760 NW2d 217 (2008). In other words, a valid claim requires plaintiff to show that a governmental employee exhibited a willful disregard of safety measures and a singular disregard for substantial risks. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Obviously, "[e]vidence of ordinary negligence does not create a question of fact regarding gross negligence." *Love v City of Detroit*, 270 Mich App 563, 565; 716 NW2d 604 (2006). "If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury. However, if reasonable minds could not differ, the issue may be determined by a motion for summary disposition." *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010).

Though plaintiff says that Maxie's actions constitute "gross negligence," the record makes clear that Maxie's conduct was not "gross[ly] negligent." Instead, she took affirmative action in response to the escalating conflict between plaintiff and Davis by: (1) verbally admonishing Davis for teasing plaintiff; (2) intervening to prevent an altercation by escorting Davis to her seat; and (3), along with the principal, acting swiftly to remove Davis from plaintiff after Davis ignored her warnings and physically attacked plaintiff. Quite obviously, this is not conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results"; nor does it demonstrate willful disregard of safety measures and a singular disregard for substantial risks. See *Tarlea*, 263 Mich App at 90. The only reasonable conclusion is that Maxie demonstrated an appropriate concern for plaintiff and attempted to protect him.[4]

Accordingly, we reverse the trial court's erroneous denial of Maxie's motion for summary disposition, and remand to the trial court for entry of an order that grants summary disposition to Maxie pursuant to MCR 2.116(C)(7).

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[3] Plaintiff does not dispute that Maxie acted within the scope of her authority or was engaged in the discharge of a governmental function.

[4] Because Maxie's actions were not "grossly negligent" per MCL 691.1407, she is immune from this tort suit and therefore we need not address the proximate cause issue.

Reversed and remanded for entry of summary disposition for defendant Lorna Maxie. We do not retain jurisdiction.

/s/ Cynthia D. Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra